No. 20067

UNITED STATES COURT of APPEALS

FOR THE NINTH CIRCUIT

SUE F. GEORGE, *Appellant,*

vs.

NEW YORK LIFE INSURANCE COMPANY, a Mutual Insurance Company, *Appellee.*

On Appeal From The United States District Court For The Eastern District Of Washington Northern Division

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BRIEF OF APPELLANT

WILLIAM B. BANTZ
of Bantz & Hemovich
418 Symons Building, Spokane, Washington
Attorneys for Appellant, Sue F. George

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SUBJECT INDEX

TABLE OF CASES

TABLE OF CASES—(Continued)

TABLE OF TEXTS

TABLE OF STATUTES

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JURISDICTIONAL STATEMENT

This case is based upon a Washington State Resident's suing a foreign corporation for a sum in excess of ten thousand dollars ($10,000.00). 28 USCA 1332 (R-2-3) and pretrial order.

The case was tried before the United States District

Court, Eastern District of Washington, Northern Division, without a jury on November 19, 1964. Judgment was entered for the defendant on the 21st day of December, 1964. Appeal is being taken from said judgment.

STATEMENT OF THE CASE

The decedent, Henry S. George, was found dead, on or about June 24, 1963, in the bathroom of a hotel room in Spokane, Washington, where he made his home. At the time of his death there was in full force and effect a life insurance policy on the life of the said Henry S. George, written by the defendant company. By the terms of said policy the plaintiff was beneficiary. The life policy was in the face amount of $50,000.00 with a double indemnity rider calling for payment of an additional $50,000.00 to the beneficiary in the event the death of the insured "resulted directly, and independently of all other causes, from bodily injury effected solely through external, violent and accidental means. . . ."

It is undisputed that timely proofs of death and proper claims for both the basic and the double indemnity coverage were made. The face amount of the policy, $50,000.00, was paid and the defendant refused payment of the accidental means death provision of the policy (Pre-Trial Order).

As is shown in the pretrial order, the issue presented by the contentions of the parties resolves down to the question of whether or not the insured died by

external, violent and accidental means within the language of the insurance policy in question.

The law of the State of Washington controls. Actually there is no basic dispute between the parties as to the principles of law applicable to the sole issue presented in this cause. Where a claim is made by the beneficiary and rejected by the insurer on a double indemnity coverage such as is before us, the plaintiff has the burden initially of proving that the insured's death was caused by violent, external and accidental means. Upon a prima facie showing by the plaintiff in this regard, the burden shifts to the defendant to overcome the proof of death by violent, external and accidental means or to prove the bar of some other exclusion under the policy.

SPECIFICATIONS OF ERROR

The court erred in the following paragraphs set forth in the Court's Memorandum dated December 7, 1964, which was used as the Findings of Fact and Conclusions of Law pursuant to Rule 52.

(2) There were no external marks of bruises or contusions of any kind indicating an injury. Some evidence of a blueness below the right jaw line was offered, but this was post mortem lividity and not a bruise.

This finding is not sustained (R65-66 and 241).

(4) Upon examination by physicians, the body showed no evidence of petechial hemorrhaging; no

evidence of cyanosis and no evidence that convulsions had preceded death. No injury to the air passages was found. Some or all of these conditions are present in the majority of cases where there has been death by strangulation.

This finding was refuted by Dr. Hill (R-64-65-66).

(5) An autopsy was performed on the cadaver some four days after the body was discovered, which was nearly five days after death. No anatomical cause of death could be ascertained by the pathologist performing the autopsy.

This finding was explained by Dr. Hill (R-60) and if finding is correct it would appear to eliminate death by cerebral vascular accident as found by the court, as Dr. Hill stated he would have found such if it were the case.

(6) The decedent had a history of high blood pressure, indicating the disease of hypertension. A common cause of death in hypertension cases is by circulatory vascular accident, that is, a rupture of a blood vessel.

There was no testimony that it caused his death or that he had any real problem with high blood pressure at time of his death and it did not show in the autopsy. Hill (R-60), Stier (R-187), Kalez (R-137).

(7) Because of the elapsed time between the death and the autopsy, post mortem autolysis had set in and the cells of the brain were so deteriorated as to cause microscopic examination of the brain cells to be valueless.

Dr. Hill refutes this and states he could tell, and would have made necessary findings if deceased had a stroke that would have killed deceased (R-60).

(8) The liver was the only bodily organ showing any significant pre-death malfunction. This organ showed a marked, severe and diffuse fatty metamorphis, probably due to longtime over-indulgence in alcohol by the decedent. In this disease, fatty substance infiltrates the liver cells and reduces the ability of the liver to store sugar needed to maintain the sugar level in the blood.

Three doctors found that this was not a contributing factor to his death. Dr. Logan (R-81), Dr. Higgins (R-219), Dr. Kleveland (R-232).

(10) A total of eight doctors testified to a total of four different possible causes of death: Strangulation, hypoglycemic shock; cerebral vascular accident (stroke); and ventricular fibrillation. Each of such doctors admitted that the conclusion reached by him was the result of speculation. Insufficient physical evidence of the cause of death could be demonstrated by any doctor or doctors to establish with certainty the exact reason for the death of the insured decedent.

The only doctor using facts that he saw and further, that stated, after knowing the facts "more likely than not what he died from was strangulation," was Dr. Hill (R-61).

(11) The opinion of Dr. Hill, pathologist and principal medical witness for the plaintiff, that death was

by strangulation, was based on a description of the position of the body given to him by Doctors Kalez and Higgins, each of whom viewed the body prior to its being moved. However, these two doctors, who so viewed the body, stated that the air passages were not closed by the position of the body. In view of this fact, and the absence of any of the usual conditions present with strangulation deaths, Dr. Hill's conclusion of strangulation is not based on a satisfactory premise and cannot be accepted.

Dr. Hill was allowed only to take Kalez and Higgins' word for how he looked. Court refused to let Peter Dix testify and offer of proof was made as to the testimony which should have been admitted (R-23). Furthermore, we find nothing in record to substantiate the Court that Dr. Higgins stated "air passages were not closed when he viewed the body," and further, Dr. Kalez (R-125) states as follows:

> "Q. Assuming there was no obstruction of the windpipe due to food or any foreign object, I will ask you, sir, if the position in which that body was lying was such that if the person had not been dead, could he have breathed?
>
> "A. Well, it would be speculative but I think that he could have due to his build in the neck; however, we were suspicious that he might have hit his head or might have even broken his neck on the fall, but if he had it would have occurred after death and that is why we asked for the autopsy."

(14) The only unrefuted cause of death was from natural causes, i.e., a cerebral vascular accident.

This was controverted by Dr. Hill (R-60), Dr. Stier (R-187), Dr. Kalez (R-137).

(15) The court finds that Henry S. George was dead or dying while still on his feet and in an erect position.

No evidence to this—only speculation of some doctors, but was controverted by Dr. Hill.

The Court concludes from the foregoing facts that the plaintiff has failed initially to prove that the insured died from violent, external and accidental means.

The Court found that there was enough evidence at the end of plaintiff's case to deny the defendant's motion for dismissal of the action (R-112).

At this time, the burden shifted to the defendant as to cause of death. The defendant then came up with three separate causes of death and each of the three doctors for the defendant said that the other doctors' diagnosis was wrong and did not agree with it.

The Court then concluded that the defendant had proved by a preponderance of the evidence that death was not caused by violent, external and accidental means, and that, on the contrary, death was by natural causes.

Again, how can the court find a preponderance of evidence from the defendant's witnesses when the defendant shows three causes of death, all not connected with the other, all disagreeing with the others'

reasons and specifically, the defendant's pathologist, Dr. Stier, disagrees with Dr. Kalez as to the cause of death and yet the Court finds that Dr. Kalez is apparently correct. Then the defendant's Dr. Myhre disagrees with both of them. Dr. Higgins took Dr. Kalez' word for cause of death; however, even Dr. Higgins disagreed with the defendant's other doctors as to the liver, heart and fibrillation contributing to or causing deceased's death.

EVIDENCE

The evidence shows that Dr. John Hill did the autopsy on the deceased (R-47-48) on June 28, 1964. It further shows that Dr. Hill is the pathologist at one of the largest hospitals in the northwest and that he has done over seven thousand autopsies (R-47).

The evidence showed that Dr. Hill was the only doctor that testified that had actually thoroughly examined the deceased except for the embalmer, Bill Hayes (R-222 & 229).

The evidence showed that Dr. Hill, as pathologist doing the autopsy, was in the best position to know what happened. The defendant's own witness, Dr. Stier, another pathologist, so stated (R-199).

The evidence did show by Dr. Hill that there was no anatomical reason for death, but that after knowing all the facts and now knowing the position the deceased was found, he stated: "That it was more likely

than not that he would strangle or suffocate in the position he was found." (R-61).

Dr. Hill testified further that he did not die because of a *heart attack, a stroke,* or *liver disease.*

Dr. Stier agreed with Dr. Hill as to death by heart attack or stroke or other circulatory diseases (R-187).

Dr. Logan, a liver specialist, agreed with Dr. Hill as to the liver disease not being fatal (R-81).

Dr. Higgins also agreed that the liver did not kill him nor did hypoglecemic shock (R-219 & 220).

Dr. Kleveland agreed with Dr. Hill that his heart through ventricular fibrillation did not kill deceased nor was there any relationship between the liver and ventricular fibrillation (R-232).

Dr. Myhre stated that deceased died of ventricular fibrillation, however, no one else agreed with this diagnosis.

ARGUMENT

The trial court, sitting without the jury, at the end of the plaintiff's case apparently felt that there was sufficient evidence to not grant the motion dismissing this action. The court felt, at that time, that the plaintiff proved by a prima facie case that the deceased died from bodily injuries effected solely through external, violent and accidental means which would allow the plaintiff to recover.

At the time the motion to dismiss was denied, the

burden shifted to the defendant for them to show that the deceased did not die from bodily injury effected solely through external, violent and accidental means. All the defendant proved was simply a fact that their doctors, namely five as set forth in the record, could not agree on any one cause of death—in fact, the defendant's doctors specifically set forth three distinct and separate causes of the death and while doing so, each of the defendant's doctors contradicted the other defendant's doctors. The defendant, by this type of testimony does not show by a preponderance of the evidence that the deceased died of natural causes. All they do is show that five doctors do not agree, in fact disagree, with one another why the deceased died. All of the defendant's doctors admitted that they were speculating and that they did not know the cause of death with any reasonable medical certainty.

In substance, all the defendant did was to say to the court, we do not know, you take your choice. Dr. Hill, the plaintiff's doctor, was the only doctor that examined and did an autopsy on the deceased and was the only one that could determine any real medical facts, and he stated that "after knowing all of the facts, that it was more probable than not that the deceased died of strangulation or suffocation." (R-61).

Once the burden shifted to the defendant and they failed to sustain the burden of proof by a preponderance of the evidence, the verdict should have been for the plaintiff.

The court relied on inconsistent testimony of the

defendant's own witnesses in determining the cause of death. The court set out in its finding number 14, "The only unrefuted cause of death was from natural causes, i.e., a cerebral vascular accident"; however, this was refuted not only by Dr. Hill (R-60) but defendant's own Dr. Stier (R-187) and Dr. Kalez (R-137).

There is not sufficient evidence in the record for the court to find that there was a preponderance of evidence that the deceased died of natural causes. The court could and did only speculate as to the cause of death from the evidence as there was no substantial evidence of this—only conjecture and speculation.

Washington Supreme Court has repudiated the so called scintilla of evidence rule and has repeatedly held that evidence sufficient to support a verdict must be substantial.

There was more than sufficient evidence to properly cover the wounds or injury aspect of the case. There was testimony by doctors as well as laymen that it looked like the deceased had a broken neck. There was a bruise and swelling on lower right jaw and on the right side of neck.

The plaintiff should have been allowed to have Peter Dix' testimony admitted as a layman's viewpoint of whether or not the deceased would have been able to breathe.

The real expert in the case was Dr. Hill. The record shows he has done over 7,000 autopsies; that he is the head pathologist of one of the largest hospitals in the Northwest. He was the only one in the position to

properly evaluate the cause of death. As was stated before, even the defendant's pathologist, Dr. Stier, said Dr. Hill was the one in the best position to know what went on. The other doctors were only trying to second guess Dr. Hill at the time of trial and their findings were strictly based on conjecture and speculation.

The specification of errors set out previously by number in the judge's memorandum opinion, and the answers set out to each specification of error shows that the court did not take into consideration all of the testimony of the doctors. The assignments of error are well taken in that the memorandum opinion used by the court and the defendant for its findings and conclusions was in error and the verdict should have been granted for the plaintiff.

LEGAL ISSUES AND AUTHORITIES

Burden of Proof:

Once the plaintiff has made a prima facie case that the deceased died under the accidental provision of the life policy, the burden of proof then shifts to the defendant and the defendant must prove by a preponderance of the evidence that the deceased died from natural causes and that this burden of proof cannot be sustained or upheld by a mere matter of conjecture or speculation.

In *Graham v. New York Life Insurance Company,* 182 Wash. 612 at page 619:

> "In an action for a double indemnity under an accident clause where an insured fell or jumped from a fire escape at the 16th floor of a building, the presumption of accidental death from a death by external and violent means remains and was not overcome, or the affirmative defense of suicide established, where all of the facts and circumstances tending to support the defense were subject to different constructions."

As was stated in the case of *Browning v. Equitable Life Assurance Company,* 80 P. (2d) 348, the Court laid down the rule that the burden of going forward with the proof is on the insurer to establish that the injury or death came within the exclusion clause of a particular policy.

The case of *Griffin v. Prudential Insurance Company,* 133 P. (2d) 333, (Utah), sets forth the same proposition, that is, that where the insurance company relies on an exclusion or exception clause contained in the policy, the burden of proof is on the insurer; in an action for double indemnity in a case where death results from a fall, the cause of which is unknown, to show that the fall resulted "directly or indirectly from bodily or mental infirmity or disease in any form.

Trotter v. Industrial Health, Accident & Life Insurance Company, 175 Atl. 884, (Penn.) the Court held that the insurer had burden in proving the defense that the insured died of heart disease within the exception in the policy. To the same effect is the case of *Nalty v. Federal Casualty Company,* 245 Ill. App. 180.

In *Metropolitan Life Insurance Company v. Broyer,*

20 F. (2d) 818, where the plaintiff brought forward evidence that death occurred in such a way as naturally pointed to accident, plaintiff was held not bound to disprove negatively other causes of death.

Rogers v. Prudential Insurance Company of America, 270 Ill. App. 515, the Court held that where a plaintiff in an action on insurance policies providing for double indemnity in case of accidental death makes out a prima facie case of death of the insured from external, violent and accidental means, the burden is then upon the defendant to show that the death resulted from a cause excepted in the policy.

As is pointed out in the case of *Metropolitan Life Insurance Company v. Jenkins,* 12 So. (2d) 374, the defendant insurance company cannot meet its burden of proof by speculation, conjecture and surmise, but must find some logical support in the testimony to sufficiently establish its defense.

Continental Casualty Company v. James Paul, 209 Ala. 166, 95 So. 814, 30 A. L. R. 802 (1923).

> "We recognize, of course, that what is referred to as the scintilla doctrine prevails in this state, but this does not at all conflict with the equally well-known rule that a conclusion as to liability which rests upon speculation pure and simple is not the proper basis for a verdict. 'Inference in legal parlance, as respects evidence, is a very different matter from 'supposition.' The former is a dedication from proven facts; while the latter requires no such premise for its justification. And the courts and juries in dealing with the inquiry whether a party has discharged his burden of

> proof, cannot pronounce upon mere supposition that the burden has been met.' . . . Where testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."

In *Frame v. Prudential Insurance Company of America,* 56 Atl. (2d) 76, the Court stated that the fact, as a mere matter of speculation, there may have been a contributing factor to death of the insured other than external, violent and accidental means does not preclude a recovery under accidental death provisions of the life policy. The Court went on to say that the right to recover on the policy was barred only if there was, in fact, such a contributing factor, not if, as a mere matter of speculation, there may have been. The case of *Kelley v. Pittsburgh Casualty Company,* 100 Atl. 494, (Penn.) the court was called upon to construe a similiar provision in a double indemnity life insurance policy. The Court stated, at page 495 of that opinion:

> "Our position at the trial may be well defined, substituting the word 'disability' for the word 'death', by an extract from 5 Ann. Cas., pp. 86, 87, which is as follows:
>
> " 'If disease, while existing, be but a condition, and the accident the moving, sole, and proximate cause of the death, the exception in the policy will not relieve the insurer for death so caused. Thus it has been said that, if an insured should suffer

death by drowning, no matter what the cause of his falling into the water, whether disease or slipping, the drowning in such case would be the proximate and sole cause of the death, unless it appeared that death would have been the result, even had there been no water at hand. . . .'

"So it seems death due to chronic alcoholism and a broken limb is not within the exception, if the proximate cause of death is the accident and resulting injury. . . . Death due to a fall caused by a sudden ailment or disorder is not the result of disease within the meaning of an exception in a policy; the fall being the sole and proximate cause of death. . . . The same is true in case of death caused by a fall rupturing an artery weakened by a tumor."

In the case of *Doke v. United Pacific Insurance Co.*, 15 Wn. (2d) 536, the Supreme Court has recognized that a presumption of "accidental means" arises when there has been established that a death was the result of external and violent means. At page 544-545 of that opinion, the court stated:

"The next question is whether the burden was on the appellant to show the manner in which the accident occurred.

"In 29 Am. Jur. 1082, sec. 1443, after stating the general rule that the plaintiff in an accident insurance policy must prove that the death or injury for which the action is brought must be caused by accidental means, within the terms of the policy, this is said:

" 'In this respect, the authorities support the general rule that in an action on a policy insuring against death caused solely by external, violent, and accidental means, the burden of proof is on the plaintiff to show from all the evidence that

> the death of the insured was the result of accidental as well as external and violent means, but that where death by unexplained, violent, and external means is established, a presumption is thereby made of the fact that the injuries were accidental, without direct and positive testimony on that point, since the law will not presume that the injuries were inflicted intentionally by the deceased or by some other person.' "

Cox v. Polson Logging Company, 18 Wn. (2d) 49 at page 68:

> "This court has repudiated the so called scintilla of evidence rule and has repeatedly held that evidence sufficient to support a verdict must be substantial."

In this case now before the court, it was encumbent upon the court to find sufficient evidence in the case to meet defendant's burden of proof by a preponderance of the evidence that an exclusion or exception was applicable, not a finding or a verdict based on conjecture or speculation. Once a prima facie case is made for the plaintiff, if there is not a preponderance of the evidence admitted for the defendant, the verdict must be for the plaintiff.

Expert and Non-Expert Testimony:

The only expert to testify as what he felt was based on more than mere conjecture or speculation was Dr. Hill. The testimony of Peter Dix should have been admitted as a layman's testimony. Offer of proof was made as to Dix's testimony (R-23) but the evidence was not admitted by the court and could not be taken

into consideration on hypothetical question later in the trial.

In the case of *Graham v. Police & Firemen's Ass'n.*, 10 Wn. (2d) 288, our Court held that a layman, who has had an opportunity to draw a conclusion as to the cause of death, after making sufficient observations may testify as to those conclusions. At page 295 of that opinion:

> "In determining questions such as presented in this case, Court and juries must accord great weight to the evidence given by physicians. They may, however, consider the testimony of non-experts when it is based upon observation and the opportunity to draw a conclusion. In cases where the information is the result of familiar association, a layman, may testify to disposition, appearance, and physical condition of an individual."

The rule stated in the *Graham* case, supra, was reiterated with approval in *Arthurs v. National Postal Trans. Ass'n.*, 49 Wn. (2d) 570, at page 578:

> "Although, in determining the cause of death, great weight must be accorded to the evidence of physicians, the testimony of non-experts may be considered when it is based upon observation; and in cases where the information is the result of familiar association, a layman may testify to disposition, appearance, and physical condition of an individual. . . ."

At 20 Am. Jur. 1206, page 1257, it states as to expert opinion testimony:

> "When expert opinions differ, the care and accuracy with which the experts have determined

the data upon which they have their conclusions are to be considered. Opinion testimony founded upon facts within the knowledge and experience of the witness and supported by good reasons is likely to receive greater credence and carry more weight than a purely speculative theory or one which is rendered by persons not qualified in the field about which they testify. . . .

"Positive expert testimony will prevail over negative expert testimony." 97 ALR 1399, 41 P. (2d) 605.

In the case of *Orcutt v. Spokane County,* 58 Wn. (2d) 846, at page 853, the court stated:

"We have often held that in actions in which recovery is sought for physical conditions allegedly resulting from injuries inflicted by the wrongful act of the defendant, the finding must produce evidence to establish, with reasonable certainty, a causal relationship between the injury and the subsequent condition, so that the jury will not be indulging in speculation and conjecture in passing upon the issue. (Citing cases) Although we have held this may be established by circumstantial evidence, medical testimony is necessary when the causal relationship is not clearly disclosed by the circumstantial evidence. Moreover, we have held this medical testimony must at least be that the injury 'probably' or 'more likely than not' caused the subsequent condition, rather than that the accident or injury 'might have,' 'could have,' or 'possibly did' cause the subsequent condition. (Citing cases.)"

In the case at hand, medical witnesses who testified on behalf of the defendant admitted that their testimony was based upon speculation or conjecture.

Injury or Wounds:

There was more than sufficient evidence to sustain a verdict on external wounds in that Dr. Kalez stated that it looked like deceased's neck could be broken (R-148). Hayes, the embalmer, found discoloration on his neck and jaw that looked like a bruise (R-225). And further, the deceased's brother, John George, noticed the same bruise and discoloration in the same area prior to the funeral of deceased (R-109).

In *Hodgkinson v. Dept of Labor & Industries,* 52 Wn. (2d) 500, an "injury" is described as follows:

> " 'Injury' means a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without; an occupational disease; and such physical condition as results from either."

A further definition of "injury" appears in 29 Am. Jur. 315-316, sec. 1168:

> ". . . An accidental bodily injury has been defined as a localized abnormal condition of the living body, directly caused by accident. . . ."

Another definition which is noteworthy in the instant case is that of "visible contusion or wound." In the case of *Hill v. Great Northern Life Ins. Co.,* 186 Wash. 167, the court states, at page 173:

> "The words, 'visible mark or evidence of injury,' and similar expressions used in accident insurance policies such as we have here, are not construed in the strict and narrow sense of a

bruise, contusion, laceration, or fracture, but in the broad sense of something that is discernible, perceptible or evident upon observation. 6 *Couch on Insurance,* sec. 1265. This is the general rule that is followed in this state. In *Horsfall v. Pacific Mutual Life Ins. Co.,* 32 Wash. 132. . . . where the identical question was presented, this court said:

" 'It is also urged that the injuries causing death left no visible external mark, produced at the time of and by the accident, upon the body of deceased, and therefore the injury was one excepted from the policy. The evidence as stated above shows that immediately after the accident the deceased became deathly pale and sick, his hands and feet became cold, and the perspiration stood out on his face and hands. The next day after the accident his skin, which previously had been ruddy, became a bluish gray color, and remained so until his death. These, we think, were visible external marks, and sufficient to bring the case within the terms of the policy. (Citing authorities)' "

Also, in 29 Am. Jur. 319-320, sec. 1173, Visible Contusions and Wounds:

"In some policies provision is made for indemnity or increased indemnity in case of death or injury by accidental means of which there is a visible 'contusion or wound.' The purpose of such a provision is to have visible and physical evidence of the means which are alleged to have effected the bodily injuries.

"The words 'contusion' and 'wound' as thus used have been variously defined. The term 'visible contusion,' as used in a provision of a life insurance policy for double indemnity where death occurs as a result of bodily injuries effected by ex-

CERTIFICATE OF COUNSEL

WILLIAM B. BANTZ, one of the attorneys for the appellant, states:

I certify that, in connection with the preparation of the brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

.....

Attorney for Appellant